

REMARKS

Claims 10 to 23 are now pending.

Applicant respectfully requests reconsideration of the present application in view of this response.

With respect to paragraph two (2) of the Final Office Action, claims 10 to 23 were rejected under the first paragraph of 35 U.S.C. § 112, as to the written description requirement.

The Final Office Action at page 2 asserts that “claim 10 recites ‘measures *only* in a substantially vertical direction’ however, the specification does not provide support for the claim terminology.” In addition, the Final Office Action at page 6 asserts that “alignment [of the distance measuring device] does not equate to the range of measurement.” In fact, the Substitute Specification at page 1, lines 10 to 11, states that “[t]he distance measuring device is only to be aligned essentially vertically,” and the Substitute Specification at page 4, lines 6 to 9, states:

A distance measuring device is provided which is aligned vertically to detect such a truck underride. . . . Thus, distance measurement takes place in the z direction.

Accordingly, contrary to the assertion of the Final Office Action, it is respectfully submitted that the vertical alignment also results in vertical distance measurement. In addition, Figures 1 and 2 of the specification plainly illustrate that the vertical distance measuring device measures only in a substantially vertical direction away from a vehicle underside. In particular, Figure 2 clearly shows upward sensing area 22 of measuring sensor 23. Thus, the Substitute Specification plainly provides support for the claim terminology of claim 10.

Accordingly, claim 10 satisfies the written description requirement and is therefore allowable, as are its dependent claims 11 to 23.

Withdrawal of these rejections to the claims is therefore respectfully requested.

With respect to paragraph four (4) of the Final Office Action, claims 10 to 13, and 16 were rejected under 35 U.S.C. § 102(b) as anticipated by Andre et al., Patent No. DE 19822184.

As regards the anticipation rejections of the claims, to reject a claim under 35 U.S.C. § 102, the Office must demonstrate that each and every claim feature is identically described or contained in a single prior art reference. (*See Scripps Clinic & Research Foundation v. Genentech, Inc.*, 18 U.S.P.Q.2d 1001, 1010 (Fed. Cir. 1991)). As explained herein, it is

respectfully submitted that the Final Office Action does not meet this standard, for example, as to all of the features of the claims. Still further, not only must each of the claim features be identically described, an anticipatory reference must also enable a person having ordinary skill in the art to practice the claimed subject matter. (See *Akzo, N.V. v. U.S.I.T.C.*, 1 U.S.P.Q.2d 1241, 1245 (Fed. Cir. 1986)).

As further regards the anticipation rejections, to the extent that the Final Office Action may be relying on the inherency doctrine, it is respectfully submitted that to rely on inherency, the Office must provide a “basis in fact and/or technical reasoning to reasonably support the determination that the allegedly inherent characteristic *necessarily* flows from the teachings of the applied art.” (See M.P.E.P. § 2112; emphasis in original; and see *Ex parte Levy*, 17 U.S.P.Q.2d 1461, 1464 (Bd. Pat. App. & Int’f. 1990)). Thus, the M.P.E.P. and the case law make clear that simply because a certain result or characteristic may occur in the prior art does not establish the inherency of that result or characteristic.

Claim 10 provides that *the vertical distance measuring device measures only in a substantially vertical direction away from a vehicle underside*. As explained above, support for this claim feature may be found in the Substitute Specification, e.g. at page 1, lines 10 to 11; page 4, lines 6 to 14; page 5, lines 2 to 3; Abstract, lines 1 to 3; and Figures 1 and 2.

As to the “Andre” reference, Figure 1 concerns a spacer sensor that measures horizontal distances, as well as vertical distances toward the vehicle underside. This arrangement wholly differs from the presently claimed subject matter since the sensor does not measure only in a substantially vertical direction away from a vehicle underside, as provided for in the context of the presently claimed subject matter of claim 10. Therefore, the “Andre” reference does not identically disclose (or even suggest) the feature in which the vertical distance measuring device measures only in a substantially vertical direction away from a vehicle underside, as provided for in the context of claim 10.

Accordingly, claim 10 is allowable, as are its dependent claims 11 to 13 and 16.

Withdrawal of these anticipation rejections is therefore respectfully requested.

With respect to paragraph six (6) of the Final Office Action, claims 14, 15 and 18 were rejected under 35 U.S.C. § 103(a) as unpatentable over the “Andre” reference.

To reject a claim under 35 U.S.C. § 103(a), the Office bears the initial burden of presenting a *prima facie* case of obviousness. *In re Rijckaert*, 9 F.3d 1531, 1532, 28 U.S.P.Q.2d 1955, 1956 (Fed. Cir. 1993). To establish *prima facie* obviousness, three criteria must be satisfied. First, there must be some suggestion or motivation to modify or combine

reference teachings. *In re Fine*, 837 F.2d 1071, 5 U.S.P.Q.2d 1596 (Fed. Cir. 1988). This teaching or suggestion to make the claimed combination must be found in the prior art and not based on the application disclosure. *In re Vaeck*, 947 F.2d 488, 20 U.S.P.Q.2d 1438 (Fed. Cir. 1991).

Also, as clearly indicated by the Supreme Court in *KSR*, it is “important to identify a reason that would have prompted a person of ordinary skill in the relevant field to combine the [prior art] elements” in the manner claimed. *See KSR Int’l Co. v. Teleflex, Inc.*, 127 S. Ct. 1727 (2007). In this regard, the Supreme Court further noted that “rejections on obviousness cannot be sustained by mere conclusory statements; instead, there must be some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness.” *Id.*, at 1396. Second, there must be a reasonable expectation of success. *In re Merck & Co., Inc.*, 800 F.2d 1091, 231 U.S.P.Q. 375 (Fed. Cir. 1986). Third, the prior art reference(s) must teach or suggest all of the claim features. *In re Royka*, 490 F.2d 981, 180 U.S.P.Q. 580 (C.C.P.A. 1974).

Claims 14, 15 and 18 depend from claim 10, and are therefore allowable for essentially the same reasons as claim 10. Moreover, it is respectfully submitted that rearranging parts or duplicating parts is not obvious in view of the particular benefits derived from the features of claims 14, 15, and 18, and parent claim 10, as provided for in the Substitute Specification, for example, at page 1, lines 19 to 27; and page 4, lines 8 to 12, and lines 30 to 31.

In addition, as admitted by the Final Office Action at page 4, the “Andre” reference does not disclose (or even suggest) the feature in which the vertical distance measuring device is situated on a bumper, nor that the vertical distance measuring device is situated on a rear bumper, as provided for in the context of claims 14 and 18. Further, as admitted by the Final Office Action at page 4, the “Andre” reference does not disclose (or even suggest) the feature in which the at least one vertical distance measuring device includes four vertical distance measuring devices for carrying out distance measurements at four locations on the bumper distanced from one another, as provided for in the context of claim 15.

Accordingly, claims 14, 15, and 18 are allowable for at least the above reasons.

With respect to paragraph seven (7) of the Final Office Action, claim 17 was rejected under 35 U.S.C. § 103(a) as unpatentable over the “Andre” reference as applied to claim 10 in view of Cho, U.S. Patent No. 6,408,237.

Claim 17 depends from claim 10, and is therefore allowable for at least the same reasons as claim 10, since the secondary "Cho" reference does not cure -- and is not asserted to cure -- the critical deficiencies of the principal reference. Specifically, the "Cho" reference does not disclose (or even suggest) that the vertical distance measuring device measures only in a substantially vertical direction away from a vehicle underside, as provided for in the context of claim 10. Moreover, it is respectfully submitted that configuring the device to sense pedestrians is not obvious in view of the particular benefits derived from the features of claim 17, and parent claim 10, as provided for in the Substitute Specification, for example, at page 2, lines 10 to 24.

Accordingly, claim 17 is allowable for at least the above reasons. Withdrawal of the obviousness rejections is therefore respectfully requested.

In sum, claims 10 to 23 are allowable for at least the above reasons.

Conclusion

It is therefore respectfully submitted that all of claims 10 to 23 are allowable. It is therefore respectfully requested that the objections and rejections be withdrawn, since all issues raised have been addressed and obviated. An early and favorable action on the merits is therefore respectfully requested.

Respectfully submitted,

Dated: 1/12/2009

By: 

Gerard A. Messina
Reg. No. 35,952

KENYON & KENYON LLP
One Broadway
New York, New York 10004
(212) 425-7200

CUSTOMER NO. 26646